IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)

Description of case

Date of decision: 04.09.2006

Second Appeal No. 263 of 2001
(Old No. 2248 of 1978)

Chandra Shekhar Joshi
S/o Shri Bhawani Dutt Joshi
R/o Mohalla Chinakhan
District Almora. …….. Defendant/Appellant

Versus

1. Chandra Ballabh Pant
   S/o Shri Ganga Dutt Pant
   R/o Village Lala Patti Bhairang
   District Pithoragarh…….. Plaintiff/respondent.
2. Bipin Chandra (since deceased)

2/1 Kanchan Tiwari
S/o Late Bipin Chandra

3. Ghanshyam (deceased)

3/1 Smt. Shankuntala
W/o Late Ghanshyam

3/2 Vinod Tiwari

3/3 Krishna Kant Tiwari
Both Sons of Late Ghanshyam
Residents of Mohalla-Dharanaula
Patti-Khasparja, Almora
& Others …….. Defendants/respondents

Shri P.S. Adhikari, Sr. Advocate with Shri B.S. Adhikari, Advocate for defendant/appellant.
Shri Rajendra Dobhal, Advocate assisted by Shri D.C.S. Rawat, Advocate for plaintiff/respondent No.1
Shri D.S. Patni, Shri Kishore Kumar, Shri Anil Dabral and Shri Sharad Sharma, Advocates for defendants/respondents.

A.F.R. (Approved for Reporting)
Not approved for Reporting

(Initial of Judge)

Date: 04.09.2006

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

Judgment Reserved

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   Patti-Khasparja, Almora
4. Mahesh Chandra
   S/o Badri Dutt Tiwari
   R/o Mohalla-Dharanaula, Almora
5. Chandra Shekhar (deceased)
   S/o Poornanand
5/1 Vinod Chandra, S/o Late Chandra Shekhar
6. Deep Chandra, S/o Poornanand
7. Km. Asha
   D/o Chandra Shekhar ……. Defendants/respondents

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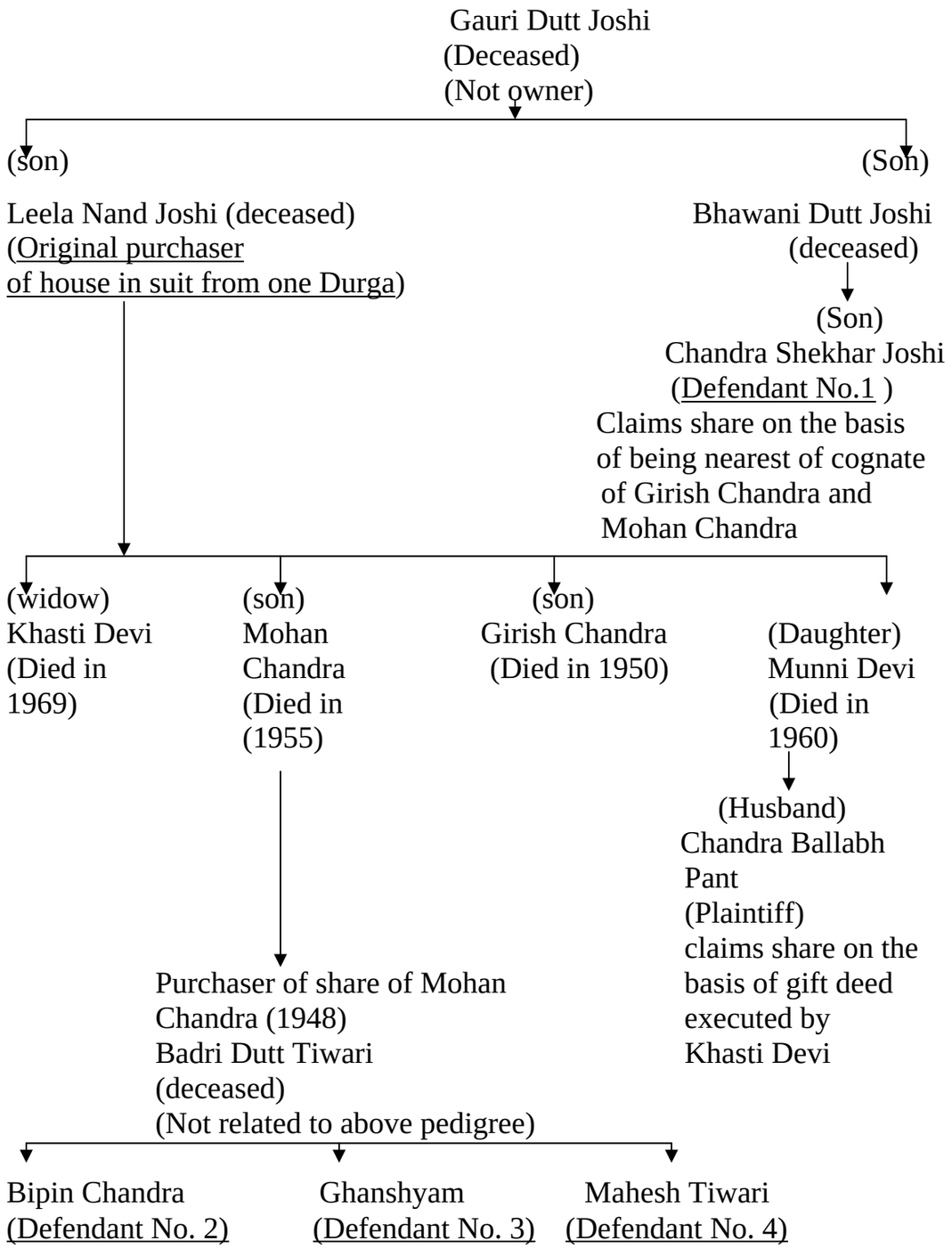
Hon’ble Prafulla C. Pant, J.

This Second Appeal, preferred under Section 100 of Code of Civil Procedure, 1908, is directed against the judgment and decree dated 10.07.1978, passed in civil appeal No. 15 of 1975 (A) by learned Civil Judge, Almora, whereby the said appeal is dismissed, affirming judgment and decree passed on 19.06.1975 by the trial court in civil suit No. 142 of 1970, for relief of possession against the appellant (defendant No. 1) with observation that the plaintiff would be entitled to execute decree for possession against defendant No. 1 (present appellant) and that he (plaintiff) would be entitled to joint possession along with defendant/respondents No. 2 to 4 over the property in suit.

2. Heard learned counsel for the parties and perused the entire record.

3. Before narrating facts of the case, it is pertinent to mention here that how the parties are related to each other. The relationship between them is as follows:



4. Brief facts of the case, as per the plaint case, are that Leela Nand Joshi (S/o Gauri Datt Joshi), father in law of the plaintiff, purchased the house in suit, situated in Mohalla Chinakhan, Almora, detailed in the foot of the plaint, in the year 1932. Shri Leela

Nand Joshi died about 30 years before the institution of the suit i.e. around 1940, leaving behind him his widow Khasti Devi, two sons- Mohan Chandra and Girish Chandra and daughter Munni Devi. Munni Devi (daughter of Leela Nand) wife of plaintiff, has also died. Girish Chandra (younger son of Leela Nand), suffering from tuberculosis died in Nainital, at the age of 16 years (as per evidence in 1950). Shri Mohand Chandra (elder son of Leela Nand) later died in the year 1955. It is pleaded that the property, as such, vested in Khasti Devi (widow of Leela Nand), who executed registered gift deed of the house in suit on 10.02.1959 in favour of the plaintiff (son-in-law of Khasti Devi). Khasti Devi died on 09.04.1969 (i.e. ten years after execution of gift deed). Plaintiff claimed his ownership over the house in suit on the basis of the gift deed, allegedly executed by his mother-n-law in his favour. It is also pleaded in the plaint that there were entries in the settlement record, in favour of Khasti Devi not only in respect house No. 872, 873 and 874 but also land beneath and appurtenant thereto numbering 245, 336, 346 and 474, measuring area 1=3 Naali (Unit of area in Uttaranchal). The aforesaid house numbers were renumbered later on, as 171, 172 and again renumbered as 82 and 83. Only one half share in these houses, is pleaded to have been transferred by gift deed in favour of the plaintiff. It is further pleaded in the plaint that in the settlement record, the rest of the half share in the property in suit is shown mutated in favour of Badri Dutt (father of

defendant No. 2 to 4), on the basis of the sale deed executed in 1948 by Mohan Chandra, son of Leela Nand Joshi. It is further pleaded that the plaintiff used to look after his mother-in-law till her death. It is pleaded that when the plaintiff was away in connection with his service, the defendants got mutated their names, as owners in possession and took illegal possession of the property in suit. Hence the suit for possession of property was filed by the plaintiff.

5. Defendant No. 1 (present appellant), contested the suit by filing his written statement in which he admitted that his Uncle Late Leela Nand Joshi (S/o Gauri Dutt), purchased the property in suit, as pleaded in the first para of the plaint. It is also admitted in the written statement of defendant No. 1 that Girish Chandra and Mohan Chandra, both sons of Leela Nand Joshi, have also died. Rest of the contents of the plaint, as stated, are not admitted. It is also denied that Khasti Devi, widow of Late Leela Nand Joshi was ever owner or in possession of the property. In the additional pleas, it has been pleaded by the defendant No. 1 that the alleged gift deed executed by Khasti Devi in favour of the plaintiff is an illegal and ineffective document. It is further pleaded that after death of Leela Nand Joshi, it was his brother Bhawani Dutt Joshi (father of answering defendant No. 1), who got possession of the property in suit. Defendant No. 1 further alleges that it was his father, who got Munni

Devi (daughter of Leela Nand Joshi), married to the plaintiff and who performed the last rites of Leela Nand Joshi after his death. In para 22 of this written statement, it has been stated that after death of Girish Chandra and Mohan Chandra (both sons of Leela Nand Joshi), Khasti Devi did not inherit any share, as by then Hindu Succession Act, 1956, has not come into force. Khasti Devi, widow of Leela Nand Joshi, got entries recorded in her favour wrongly. And entries in record, in favour of the answering defendant- Chandra Shekhar Joshi and his brothers Badri Dutt and Kanti Ballabh are correct. The suit is bad for non-joinder of aforesaid parties.

6. In their joint written statement, defendants No. 2, 3 and 4 have also admitted that Late Leela Nand Joshi, purchased property in suit. It is further admitted that Mohan Chandra and Girish Chandra were his sons and Munni Devi was his daughter. It is also admitted in the written statements of these defendants that after the death of Leela Nand Joshi in the year 1936, both Mohan Chandra and Girish Chandra died issueless. Rest of the contents of the plaint, as stated, are not admitted. In the additional pleas, it has been pleaded by defendants No. 2 to 4 that Khasti Devi did not inherit any share in the property in suit nor any share got vested in the plaintiff through the alleged gift deed. It is further stated that the suit is bad for mis-joinder of defendant No. 1 and defendant No. 5- Poornanand, as they have

no concern with the property in suit. It is specifically pleaded in para 22 of their written statement that Badri Dutt, father of defendants No. 2 to 4, purchased the property in suit through sale deed dated 11.05.1948, executed by Mohan Chandra (son of Leelanand Joshi) and as such, after the death of their father, they are the sole owners of the property in suit.

7. Defendant No. 5- Poornanand, filed his separate affidavit, simply stating he has wrongly been impleaded in the suit and he is entitled to special costs under Section 35 of the Code of Civil Procedure, 1908.

8. 8. After perusing the pleadings, the trial court, framed following issues in the suit:-

1. *Whether the gift deed, executed by Smt. Khasti Devi, is ineffective, as alleged in para 20 of the written statement of the defendant No. 1? If so, its effect?*
2. *Whether the executant (of the gift deed) Smt. Khasti Devi had no right to execute the gift deed, as alleged by the defendants?*
3. *Whether the defendant No. 1 had been in possession of the property in dispute, continuously adverse to the rights of Smt. Khasti Devi and other defendants? If so, its effect?*

4. *Whether the suit is bad for mis-joinder of parties, as alleged by defendants No. 2,3 and 4?*
5. *Whether Girish Chandra died after the execution of sale deed by Mohan Chandra? If not, its effect?*
6. *Whether the defendants No. 2,3 and 4 are bonafide purchasers for value and are protected by Section 43 of Transfer of Property Act, 1882?*
7. *To what relief, if any, the respondents are entitled?*
8. *Whether the defendants No. 2,3 and 4 have been in possession of the property in dispute, if so, its effect?*

9. The trial court, after recording the evidence and hearing the parties, found that the gift deed, executed by Khasti Devi in favour of the plaintiff, is a valid document and Smt. Khasti Devi had right to execute the gift deed in respect of property in suit. It further found that Girish Chandra died after the execution of sale deed by Mohan Chandra, in favour of defendants No. 2 to 4. The trial court found that the suit is not bad for mis-joinder of either defendant No. 1 or defendant No. 5. It further found that defendants No. 2 to 4 are not protected in respect of the interest, alleged by them over the property in suit, under Section 43 of Transfer of property Act, 1882. Lastly, it was found that defendants No. 2 to 4 were not in

exclusive possession of the property in suit, as alleged by them. And as such, the trial court decreed the suit for possession with costs, as against defendants No. 1 to 4 with clarification that the decree, as to the physical possession would be executed, as against defendant No. 1 only. Against said judgment and decree dated 19.06.1975, passed in civil suit No. 142 of 1970, the defendant No. 1, preferred appeal under Section 96 of Code of Civil Procedure, 1908, which was registered as civil appeal No. 15 of 1975 (A). The said appeal was heard and dismissed by Civil Judge, Almora on 10.07.1978, where by judgment and decree passed by the trial court is affirmed with the observation that the plaintiff has one half share in the property in suit, and as such, he shall be entitled to execute the decree for possession against defendant No. 1 (appellant) only. It is further observed by first appellate court that the plaintiff shall be entitled to decree of joint possession over the property in suit along with defendants No. 2 to 4. Aggrieved by said judgment and decree, this Second Appeal was preferred by defendant No. 1 before Allahabad High Court in the year 1978, where it was admitted on 11.08.1978 on following substantial questions of law:-

1. *Whether Smt. Khasti Devi was competent to gift away the property in suit?*
2. *Whether the civil court had jurisdiction to grant relief of possession in respect of agricultural land?*

3. *Whether the decree for joint possession could have been passed by the lower appellate court in respect of a part of property as against defendants- respondents No. 2 to 4 before it ?*

10. Answer to substantial question No. 1:-

Admittedly, property in suit was purchased by Leela Nand Joshi, uncle of defendant/appellant in the year 1932. It is also not disputed that thereafter, at the time of his death, Leela Nand Joshi, left behind him, his widow Khasti Devi, two sons- Mohan Chandra and Girish Chandra and daughter Munni Devi. It is also not disputed that Girish Chandra died issueless, in the year around 1950. Meanwhile, Mohan Chandra, one of the heirs of the deceased Leela Nand Joshi, transferred the share inherited by him in respect of the property in suit in favour of Badri Dutt Tiwari (father of defendants No. 2 to 4) through a registered sale deed dated 11.05.1948. This fact is clear from the registered sale deed (Ext. B-2), executed by Mohan Chandra read with the oral evidence, adduced on behalf of the defendants No. 2 to 4. Since Girish Chandra Joshi, brother of Mohan Chandra was alive at the time of transfer of property by him (Mohan Chandra), as such, the share inherited by Girish Chandra (younger son of Leelanand Joshi) cannot be said to have been transferred by Mohan Chandra to Badri Dutt Tiwari or his sons. It is this one half share in the property in suit in respect of which the plaintiff claims that Khasti Devi (mother of Girish Chandra),

transferred by gift deed to him while appellant/defendant No. 1 Chandra Shekhar Joshi (nephew of Khasti Devi) alleges that he being the nearest cognate after death of Mohan Chandra, got inherited that half share. At the time of death of Mohan Chandra, as is evident from the evidence on record, Khasti Devi (widow of Leela Nand Joshi) was alive. There is concurrent finding of fact of both the courts below that she remained in possession of the property in suit and used to collect rent from the tenants, as is clear from evidence of P.W. 2 Bhola Datt and P.W. 3 Bhuwan Chandra inducted in the house in suit. This Court cannot interfere with said concurrent finding of fact. That being so, provisions contained in Section 14 of Hindu Succession Act, 1956, get attracted to this case. Section 14 of Hindu Succession Act, 1956, reads as under:-

"***14. Property of female Hindu to be her absolute Property-*** *(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.*

Explanation- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property

held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will other instrument or the decree, order of award prescribed a restricted estate in such property."

Explaining the scope of Section 14 of Hindu Succession Act, 1956, in ***Jagannathan Vs. Kunjithapadam, AIR 1987, Supreme Court 1493,*** the Apex Court has held that a limited estate of a Hindu female would enlarge into an absolute estate of the property held by her in the following situation:-

(i) Where she acquired the limited estate in the property before or after the commencement of the act provided she was in possession of the property at the time of coming into force of the Act i.e. 17.06.1956.

(ii) Even if the property in question was possessed by her in lieu of her right to maintenance as against the estate of her deceased husband or the joint family property, she would be entitled to become a full or absolute owner having regard to the fact that the origin of her right was traceable to the right against her husband's estate.

It is further clarified in the aforesaid judgment by Supreme Court that there is nothing in Section 14 which supports the proposition that Hindu female should be in actual physical possession or in

constructive possession of any property on the date of the coming into operation of the Act. The expression ‘possession’ has been used in the sense of having a right to the property or control over the property. Since it has come on the evidence on record that Khasti Devi was in possession of property in suit to the extent of one half share of Girish Chandra and was collecting rent from the tenants at the time of commencement of Hindu Succession Act, 1956, and even thereafter, as such, Khasti Devi became full owner to the extent of said half share in the property in suit w.e.f. 17.06.1956. Registered gift deed dated 10.02.1959, paper No. 39A (Ext. 9) read with statement of P.W. 1 Ganga Datt (witness of gift deed) and other oral evidence adduced on behalf of the plaintiff, proves the case of the plaintiff that the said half share of Khasti Devi in the property was transferred to the plaintiff by her before her death in the year 1969. Paper No. 40 C (Ext. 1) shows that Khasti Devi before execution of the gift deed obtained permission of Assistant Collector, Almora, for transferring her share in the property. It is pertinent to mention here that in the pleadings, it is no body’s case that the house in suit is a joint Hindu family property.

11. Shri P.S. Adhikhari, learned counsel for the appellant, argued that after death of Girish Chandra in 1950, his brother Mohan Chandra inherited his (Girish Chandra’s) share in the property. And after death of Mohan Chandra, Chandra Shekhar Joshi (defendant

No.1), being the nearest cognate in the family got the said share in the property in suit. In the opinion of this Court, the argument appears to be misconceived. Even if Mohan Chandra inherited the share of Girish Chandra, on his death, since Mohan Chandra also died before the commencement of Hindu Succession Act, 1956, as is clear from the evidence on record, that it was only Khasti Devi (mother of Mohan Chandra), widow of Leelanand Joshi, who got possession of the property. Had the property been an ancestral property of Leela Nand, it could have been said that his nephew Chandra Shekhar Joshi (defendant No. 1) inherited the share on the death of his cousin Mohan Chandra. But it is not the case here. The house did not belong to Gauri Dutt, father of Leela Nand Joshi and Bhawani Dutt Joshi. Rather, it was a self-acquired property of Leela Nand Joshi. As such, his widow cannot be deprived of her life estate, received by her after the death of Leelanand Joshi and his sons Mohan Chandra and Girish Chandra. (It is pertinent to mention here that Mohan Chandra had already transferred his own share in the year 1948 before the death of Girish Chandra). For the reasons, as discussed above, this Court is of the view that Khasti Devi since became full owner to the extent of half share in the property under Section 14 of Hindu Succession act, 1956, was competent to gift away her share in the property in suit. Accordingly substantial question of law No. 1 stands answered.

12. **Answer to substantial question of law No. 2:-**

From the documentary and oral evidence on record, it is clear that the property in suit is situated in Mohalla Chinakhan, within the municipal limits of Almora. It is not established on record that the land in suit is an agricultural land, which requires to be declared as abadi land. Paper No. 45-C (Ext. 4) in the record of the trial court, which is copy of the assessment register of the Nagar Palika, Almora, shows that the house in question was assessed to tax for the year 1958-59. In the circumstances, this Court has no hesitation in holding that the civil court had jurisdiction to grant relief of possession in respect of property in suit. Accordingly, substantial question No. 2, stands answered.

13. **Answer to substantial question No. 3:-**

Since, as discussed above, it has come on record that on death of Leela Nand Joshi, share inherited by one of his son- Mohan Chandra was transferred by him (Mohan Chandra) in the year 1948 to Badri Dutt Tiwari, father of defendants No. 2 to 4, and there is no evidence that Mohan Chandra, or Badri Dutt (or his sons) got partitioned share of Mohan Chandra from the property in suit from the rest of the share of heirs of Leela Nand, as such, the first appellate court has committed no error of law in decreeing the suit for joint possession of plaintiff to that extent, and decreed the suit for possession only as against defendant No. 1 (present appellant).

Therefore, the substantial question of law No. 3 also stands answered against the appellant.

14. For the reasons, as discussed above, this Court does not find any reason to interfere with the judgment and decree, passed by the first appellate court in civil appeal No. 15 of 1975(A). Accordingly, the appeal is dismissed. Costs easy.

(Prafulla C. Pant, J.)

Dt: 04.09.2006
Sweta